

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: FLYING CLOUD POWER PARTNERS, LLC	DOCKET NO. DRU-03-2
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DECLARATORY ORDER

(Issued February 10, 2003)

On January 13, 2003, Flying Cloud Power Partners, LLC (Flying Cloud), filed with the Utilities Board (Board) a petition for declaratory ruling concerning the applicability of Iowa Code Chapter 476A or, in the alternative, a request for waiver of the statutory provisions. Flying Cloud plans to construct no more than 29 wind turbines over six square miles in Excelsior and Lakeville Townships, Dickinson County, Iowa. Each turbine will have a capacity of 1.5 MW for a total maximum nameplate capacity of 43.5 MW. Flying Cloud does not intend to furnish electricity for public consumption, but rather intends to sell the output on the wholesale market to an investor-owned utility.

The question presented by Flying Cloud is whether it is required, pursuant to Iowa Code Chapter 476A, to obtain a certificate of public convenience, use, and necessity prior to commencing construction on its wind project. The Consumer Advocate Division of the Department of Justice filed a response on January 30, 2003, stating that it did not object to the Board granting Flying Cloud's petition for declaratory order or, in the alternative, the request for waiver.

Iowa Code § 476A.2 provides "a person shall not commence to construct a facility except as provided in 476A.9 unless a certificate for the facility has been issued by the board." The statute the Board has been asked to construe is Iowa Code § 476A.1(5). This section defines "facility" as follows:

"Facility" means any electric power generating plant or a combination of plants at a single site, owned by any person, with a total capacity of twenty-five megawatts of electricity or more and those associated transmission lines connecting the generating plant to either a power transmission system or interconnected transmission system or both. Transmission lines subject to the provisions of this chapter shall not require a franchise under chapter 478.

In addition, Iowa Code § 476A.15 gives the Board the authority to waive any of the requirements of Chapter 476A if the Board determines that the public interest would not be adversely affected by the waiver. In the event the Board finds Chapter 476A applies to the Flying Cloud project, Flying Cloud requests a waiver of the chapter.

The facts concerning the project are recited in the petition for declaratory ruling. The project will consist of up to 29 individual wind turbine generators with a maximum nameplate generating capacity of 1.5 MW each, for a total project nameplate capacity of up to 43.5 MW. The project will cover approximately six square miles near Spirit Lake in Excelsior and Lakeville Townships, Dickinson County, Iowa.

Because the units are dispersed, the output of each unit will be collected through a network of feeder or collection lines. No more than 15 individual turbines, with a maximum total nameplate capacity of 22.5 MW, will be located on any single feeder or collection line.

The Board ruled on similar requests for declaratory ruling In Re: Zond Development Corporation, Docket Nos. DRU-97-5 and 97-6 (11/6/97), In Re: Northern Iowa Windpower, L.L.C., Docket No. DRU-01-1 (3/20/01), and in In Re: FPL Energy Hancock County Wind, L.L.C., Docket No. DRU-02-3 (8/27/02). In those rulings, the Board found that the term "facility" as defined in Iowa Code § 476A.1(5) refers to "wind turbines connected to a single gathering line." The Board's ruling was consistent with Reid v. Iowa State Commerce Comm'n, 357 N.W.2d 588 (Iowa 1984). This case involved a single 150 MW generating plant that had already been added at the site of an existing 124 MW plant. The operating utility sought permission from the Commerce Commission (the Board's predecessor) to open and operate a landfill for the disposal of coal combustion residue at a farm six miles away. The Commission granted the certificate, finding the landfill was an essential component of the generating plant.

On appeal, the issue concerned the definition of "facility" as used in Iowa Code § 476A.1 and, in particular, whether the words "at a single site" modify the term "any electric power generating plant" as well as the term "a combination of plants." The Court said the phrase modified only the term "a combination of plants." While the Court, therefore never, directly addressed the question of the proper application of the single site requirement, the implication was that a landfill located six miles away from the generating plant would not have met, the single site requirement if it had applied.

The Federal Energy Regulatory Commission (FERC) provides that a qualifying small power production facility, located at any one site, cannot exceed 80 MW. In

determining what is a single site, FERC considers everything within a one-mile radius as part of the site. 18 CFR 292.204(a)(2). From the map submitted with Flying Cloud's petition, if site were defined in this manner, it appears no single site would exceed the 25 MW threshold. The FERC rules demonstrate another agency has limited the definition of "site" so a single site does not encompass several square miles of wind turbines.

In addition to the legal precedent cited above, the purposes behind and the interplay between Chapter 476A and Chapter 476 must be examined. Chapter 476A generally requires any person to acquire a generating certificate for a facility of 25 MW or more. The Board has the authority, if the public interest is not adversely affected, to waive the statutory requirements such that a generating certificate would not have to be obtained. This waiver authority now applies to facilities of any size. Previously, the waiver authority only applied to facilities of 100 MW or less. A certificate proceeding is a contested case proceeding. Generally, these proceedings take a minimum of six months.

The decision criteria for a certificate proceeding case are found in Iowa Code § 476A.6. House File 577 from the 2002 legislative session eliminated three of the six original decision criteria from the siting chapter.

The three remaining criteria are: 1) construction is consistent with Iowa Code § 476.53 and the economic development policy of the state and services and operations that will not be detrimental to the provision of adequate and reliable electric service; 2) willingness to construct and operate pursuant to the terms of the certificate; and 3) construction and operation consistent with reasonable land use

and environmental policies. These criteria, other than services and operations that will not be detrimental to the provision of adequate and reliable electric service, have little or no relevance to Flying Cloud's facility. The legislature has stated that the public policy of this state is "to encourage the development of alternate energy production facilities and small hydro facilities in order to conserve our finite and expensive energy resources and to provide for their most efficient use." Iowa Code § 476.41. In addition, Iowa Code § 476.53 states that it is the intent of the general assembly to attract electric power generating facilities to the state.

The jobs, tax revenue, and investment created by the Flying Cloud's project are consistent with the state's economic development policies. Flying Cloud estimates the project will cost between \$45 and 50 million and will create dozens of jobs during the construction period. The project will also increase the local property tax base. In addition, farmers upon whose land the turbines are located will earn between \$2,000 and \$3,500 per turbine per year.

Flying Cloud states that the transmission interconnection studies indicate that the proposed facility will not be detrimental to the provision of adequate and reliable electric service. In any event, the proposed facility will need approval from appropriate transmission reliability authorities, such as the Midwest Independent System Operator, for interconnection and transmission service from the facility. If the facility involved were significantly larger, transmission impacts would be more important and could necessitate a siting proceeding.

With respect to the second factor, Flying Cloud's willingness to perform the services will be evidenced by its contract or contracts to sell power. If Flying Cloud fails to perform, the buyer or buyers will have breach of contract remedies.

The final criteria relates to environmental and land use factors. The Board has generally deferred to findings by the Department of Natural Resources and local authorities on environmental and other permit issues. Flying Cloud will have to obtain any necessary environmental or other permits from the appropriate state or local body.

As it did in the Zond, Northern Iowa, and FPL Energy cases, the Board determines that the term "facility" refers to the wind turbines connected to a common gathering line. According to the petition, up to 15 turbines will be connected to a gathering line. Because each group of 15 turbines has a nameplate capacity of no more than 22.5 MW, the 25 MW threshold of Chapter 476A is not met and no siting or generation certificate must be obtained from the Board prior to Flying Cloud commencing construction. Flying Cloud is exempt from the certification requirements of Chapter 476A under the facts and representations recited in the petition.

The Board's interpretation and construction is based, in part, on the interplay between Chapter 476A and the legislative policy embodied in Iowa Code § 476.41. Because of this legislative policy, any Board determinations required under Chapter 476A have already been made or are appropriately deferred to another regulatory body. If these projects did not involve renewable or alternate energy, the Board's construction may have been different. In addition, as noted earlier, the Board's

determination may be different if a renewable or alternate energy project were large enough to raise issues regarding possible impairment of adequate and reliable service.

The Board has found Chapter 476A does not apply to Flying Cloud's project as set forth in its petition. Therefore, the waiver request is moot and will not be addressed.

IT IS THEREFORE ORDERED:

The petition for declaratory ruling filed by Flying Cloud Partners, LLC, on January 13, 2003, is granted to the extent discussed in this ruling.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 10th day of February, 2003.